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Primitive Law

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Primitive Law

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Consider the following ancient Germanic rules regulating murder:

At the beginning of the legal development the killing, in however manner it was conducted, could only have two possible legal results: either the person killed stood outside of the legal community of the killer: then, by rights, nothing followed. Or he was part of the legal community: then the killer immediately, that is *ipso facto et iure* dropped out of the legal community.¹

This regime consists of two rules:

Rule₁ If someone takes the life of a member of our legal community he *ipso facto et iure* is no longer a member of our legal community.

Rule₂ If someone takes the life of someone who is not a member of our legal community then legally nothing happens.

Thus, if a member of our community (let us call him *Adalbert*) takes the life of another member of the legal community (let us call him *Wilco*) then the only result the regime provides for is that *Adalbert* becomes a non-member of the legal community.

Adalbert ————— kills —————→ *Wilco*

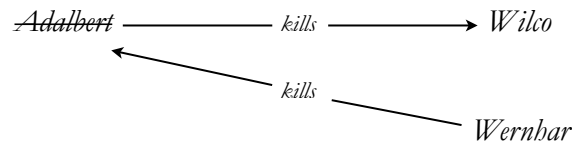
leads to

~~*Adalbert*~~ ————— kills —————→ *Wilco*

This change of status is the immediate result of the offence, it occurs *ipso facto et iure*, i.e. there is no need for adjudication or legal procedure, be it formal or informal.

¹ Bernhard Rehfeldt, 'Die Vergeistigung des Rechtes. Zur Frage der Gesetzmäßigkeiten der Rechtsentwicklung' (1950) 67 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanische Abteilung 373, 380.

Now, this immediate legal effect produces a secondary, collateral effect: imagine the case in which someone else (let us call him *Wernbar*) takes the life of *Adalbert*.



Now, since *Adalbert* is not a member of the community, taking his life is covered by Rule₂ and thus triggers no legal effect, particularly not the legal effect of jeopardising *Wernbar*'s membership in the community.² Consequently *Wernbar*'s deed does not have the legal effect of rendering a killing of him legally irrelevant.

So after *Wernbar* has killed *Adalbert* matters will very likely come to an end: 'Cases are legion where one private-enemy kills another, successively gets killed by the family members of the one killed and the matter hereby comes to an end.'³

In this paper I am going to treat this regime as being exemplary of what I call primitive law,⁴ and I am going to discuss five suggestions derived from an investigation of this primitive legal regime:

² 'There exists permitted murder. Only the one not permitted is a violation of the law.' Brunner, Heinrich and Schwerin, Claudius Freiherr von, *Deutsche Rechtsgeschichte. Band II* (2nd edn, Duncker und Humboldt 1928) 816.

³ Hans-Rudolf Hagemann, 'Vom Verbrechenskatalog des altdeutschen Strafrechts.' (1974) 91 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanische Abteilung* 10.

⁴ Despite plenty and good, if a bit dated, research supporting the conviction that the example above consists of rules which were in force and applied by actual historic people, in this paper the term 'primitive' is used more in a logical than in a historic sense. This paper does not intend to make any strong historic claim nor relies on such claims. Rather 'primitive' denotes the quality of something being neither developed nor derived from anything else. It relates more to what Paulson calls the 'ideal form of legal norms'. So, even though I do believe that Rehfeldt, Hagemann et al were right in their assessment of ancient Germanic law, I do not need them to be right. See Stanley Paulson, 'On Ideal Form, Empowering Norms, and "Normative Functions"' (1990) 3 *Ratio Juris* 84.

1. Primitive law does not tell everyone what they ought to do. It rather tells them what *they have done*.
2. Primitive law is an *organisation of violence*.
3. Primitive law *coerces* by declaring violence irrelevant.
4. Primitive law *monopolises* force by identifying certain social forces as its own forces.
5. All law is fundamentally primitive law.

A. Primitive Law

The primitive regime introduced above is not modelled on moral commands.⁵ It is, emphatically, not to be understood as a command *cum* threat of sanction, or command *cum* secondary rules, or command *cum* best moral justification, or command *cum* justification in terms of acting in accordance with reasons which apply to one independently of the command.

The primitive regime does not tell people *what they ought to do*, but rather *what they have done*. The primitive rules do not determine that Adalbert *ought* not to kill Wilco. Nor do they determine that if Adalbert kills Wilco, Adalbert *ought* to be killed. Nor do they determine that if Adalbert kills Wilco, Adalbert *ought* to lose his membership in the tribe. What they set down is that Adalbert *by* killing Wilco *has already* lost his membership in the tribe: killing a member is the same as, it *means* loss of membership. The rules thus tell us what Adalbert has done.

Irrespective of whether Adalbert has really jeopardised his membership in the tribe in a sociological or psychological or otherwise ‘factual’ sense, the rules allow us interpret Adalbert as having lost his membership. In allowing a certain interpretation the rules function as a *scheme* of interpretation.

This primitive regime schematises the interpretation of violence in the following way: acts of violence have a certain legal meaning, i.e. loss of membership. Under special circumstances,

⁵ ‘Legal commands and prescriptions are essentially foreign to the Germans.’ Bernhard Rehfeldt, ‘Recht, Religion und Moral bei den frühen Germanen’ (1954) 71 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanische Abteilung 10.

however, the very same acts of violence have *no* legal meaning. Legally, some acts of violence are explicitly made irrelevant.

By declaring certain acts of violence irrelevant, the regime establishes a *coercive* order.⁶ It does so in the following doubly indirect manner: given the realisation of a certain condition (killing of a member), certain acts of violence (killing of a member-killer) are declared legally irrelevant and are thus indirectly *allowed*. By indirectly allowing these acts, the realisation of the condition is indirectly *forbidden*.

This primitive regime governs murder not by starting with the prohibition as the primary norm and then the addition of rules about the application of a sanction as a secondary norm.⁷ Nor does it command a sanction as a primary norm, from which the prohibition of the action under threat of sanction can be derived as a secondary norm.⁸ Rather, this primitive regime knows only the primary norms that if someone kills a member he loses his membership and thus that if someone kills a member-killer, *nothing* happens. Everything else is opinion. Everything else is left to the members to make out for themselves. It is derivative and can thus be called ‘secondary’ and ‘tertiary’.

Of course, the norm, that under certain circumstances killing someone has no legal consequences will pre-structure the reasoning of the members. If they are reasonable, considering the primary norms above will make them say to themselves: (a) ‘I *ought* not to kill another member.’ This, however, means: (b) ‘*If* I do not want to be killed, I ought not to kill another member’, which, in turn, is shorthand for (c) ‘If I don’t want there to be no legal

⁶ The question whether coercion is a constitutive element of the nature of law has been a recurring question in jurisprudence. The claim that coercion does not form an element of the nature of law, this is still a minority position. See Grant Lamond, ‘Coercion and the Nature of Law’ (2001) 7 *Legal Theory* 35.

⁷ This is roughly the way in which HLA Hart uses the terms ‘primary rule’ and ‘secondary rule’. See HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 79-99.

⁸ This is the way in which Kelsen sometimes uses the terms ‘primary norm’ and ‘secondary norm’. It is the opposite to Hart’s use of these terms. See Hans Kelsen, *Allgemeine Staatslehre* (Springer 1925) 51. For a discussion of the ‘ideal form’ of legal norms see Stanley Paulson, ‘An Empowerment Theory of Legal Norms’ (1988) 1 *Ratio Juris* 58 and Stanley Paulson, ‘On Ideal Form, Empowering Norms, and “Normative Functions”’ (1990) 3 *Ratio Juris* 84.

consequences to someone killing me, I'd rather not kill another member.'

Norm (a) is a 'quaternary' norm, norm (b) is a 'tertiary' norm and norm (c) is a 'secondary' norm. These norms are vested with only hypothetical normativity. Their bindingness depends on the motivation and beliefs of the agents.

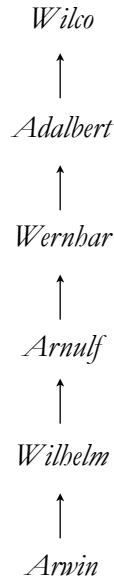
Only the primary norms possess more than hypothetical normativity. The primary norms 'If someone kills a member everyone is allowed to interpret him as having lost his membership' and 'If someone kills a member-killer everyone is allowed to interpret this as having no legal consequence' are valid independently of the beliefs and motives of the agents. They apply categorically.⁹

Even though this normativity is categorical, it is still oblique. It does neither prescribe nor forbid anything. Rather it *allows* everyone to interpret the member-killer as having lost his membership. The categorical normativity can only be found in authorisation. In this regime primitive law does not forbid, it allows, it permits.¹⁰

Take the following series of killings: *Adalbert* kills *Wilco*, in revenge *Wernbar* kills *Adalbert*, in revenge *Arnulf* kills *Wernbar*, in revenge *Wilhelm* kills *Arnulf*, in revenge *Arwin* kills *Wilhelm*.

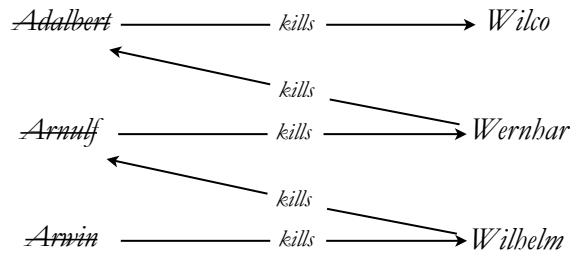
⁹ This categorical validity of the primary norms is, however, a result entirely of the epistemological rather than the practical validity of these norms. Leif Wenar was kind enough to point this out.

¹⁰ For an interpretation of Kelsen's work that takes empowerment (*Ermächtigung*) to be the fundamental deontic operator of the law see Paulson, 'An Empowerment Theory' (n 7) and Paulson, 'On Ideal Form' (n 7). For a criticism of this position see Roberto J. Vernengo, 'About an Empowerment Theory of Legal Norms and Some Related Problems' (1989) 2 *Ratio Juris* 299 and Ota Weinberger, 'The Theory of Legal Dynamics Reconsidered' (1991) 4 *Ratio Juris* 18, 30-32. See also Stanley Paulson and Bert van Roermund, 'Kelsen, Authority and Competence: An Introduction' (2000) 19 *Law and Philosophy* 125; Bert van Roermund, 'Authority and Authorisation' (2000) 19 *Law and Philosophy* 201.



Viewed morally, this situation of repeated killing is but a disastrous state of war. Morality tells us things *ought to be different*, people ought to stop killing each other, there ought to be peace. The regime of primitive law, however, does not tell us what ought to be. It tells us what is.

With the two simple rules given above primitive law allows us to interpret the actions of *Adalbert*, *Arnulf* and *Arwin* (the A-clan) as having the legal effect of them losing their membership in our community, whereas the same actions of *Wernbar* and *Wilhelm* (the W-clan) do not have any legal effect.



The killings of the W-clan are thus allowed, and the killings of the A-clan are forbidden. The killings of the A-clan are ‘misdeeds’ and the killings of the W-clan are ‘sanctions’. The A-clan is a band of criminals, whereas the members of the W-clan are the organs of the state, the W-clan is ‘the state’ that keeps the

peace. So the rules allow us to interpret the situation of war *as* peace. Morality demands that there *ought to be peace*. Primitive law tells us that what ought to be, actually already is. It orders the world not by telling it what it ought to be, but by telling it what it is.

Primitive law allows to interpret war *as* peace-keeping. Insofar primitive law pacifies the land not by demanding peace, but by declaring peace. The law does not make peace by abolishing the use of force but by declaring a certain force to be its own force. It makes peace by *monopolising* force.¹¹

We tend to think that the law monopolises force by forbidding the use of force and then somehow preventing the use of force. This, however, presupposes that the law already has force. However, the law, strictly speaking, does not have any actual power, it cannot force anyone to do anything. The law is language.

Rather than forbidding and preventing the use of force, the law monopolises force by declaring a certain force legally irrelevant. It thus decides which social force is *its own* force. Primitive law does not monopolise force by somehow mustering an irresistible actual power and commanding everyone to refrain from using force. Rather, it declares a certain social force to be the legal force.

The classical phrase *non sub homine, sed sub lege* sets up the alternative of either being ruled by men or being ruled by law. It suggests an alternative of either being ruled by force or being ruled by language. However, both force and language by themselves are unfit to rule.

¹¹ 'The law attaches certain conditions to the use of force in relations among men, authorising the employment of force only by certain individuals and only under certain circumstances. The law allows conduct which, under all other circumstances, is to be considered as "forbidden". To be forbidden means to be the very condition for such a coercive act as a sanction. The individual who, authorised by the legal order, applies the coercive measure (the sanction), acts as an organ of this order, or of the community constituted thereby. And hence one may say that law makes the use of force a monopoly of the community. And precisely by so doing, law pacifies the community.' in Kelsen, Hans. 'The Law As a Specific Social Technique.' (1941) 9 The University of Chicago Law Review 75, 81.

Language by itself cannot dominate, language by itself cannot impose itself on a group of people. But force, too, is by itself unfit to rule. No-one can rule by force alone. One able-bodied man can dominate at best one or two other able-bodied men. In order to dominate more than these one or two, he needs support. So he might want to force the one or two men he dominates to support him dominate more men. He will only be successful in that attempt if the one or two men he dominates have enough force to dominate other men. In that case, however, each of them will also have enough force to in turn dominate the potential ruler by force alone. The potential ruler by force faces an irresolvable dilemma. In order to dominate others he needs the others to be weak. In order to dominate through others he needs them to be strong.¹² Any rule thus necessarily includes something other than force.

It is thus only through both, force and language (*non solo homine, set etiam lege*) through which the law rules and dominates.

The regime of primitive law *identifies* the sovereign force among the existing forces. The law does not *create* a consolidated force, rather, it consolidates force by declaring the prevalent historic force to be *its own force*. Insofar the law never needs to exert itself, it does not have to subject social power or fight an opposition. All it needs to do is to interpret an already existing social force to be the legal force.

Primitive law really is, as Kelsen put it ‘an organisation of force.’¹³ What Kelsen has not made clear, however, is *how* force can be organised. Things can be organised by force. Force cannot be organised by force. Force can only be organised by language, by interpretation. The law, being an organisation of force, is an interpretation of force.

So to the extent to which the classic Hobbesian question (‘How was it possible that we transcended the state of nature into a state of society?’) presupposes that the transition from the *status naturalis* to the *status civilis* was in some sense a progress in the world of facts, it is misguided. The Leviathan does not emerge in

¹² See Alexandre Kojève, ‘Tyranny and Wisdom’ in Leo Strauss, *On Tyranny* (University of Chicago Press 2000) 144.

¹³ Kelsen (n 10) 81.

the realm of facts but in the realm of social self-interpretation. The Leviathan is brought into being not by *making* it but by *identifying* it. The Leviathan is a scheme.

What, then, is a scheme? The law as a scheme of interpretation must not be confused with a fiction. Adalbert is not treated by the law *as if* he lost his membership. He lost his membership—*sans phrase*. Traditionally, a fiction is an *assumptio contra veritatem pro veritate in re certa*.¹⁴ However, in our case we do not assume something to be true (*pro veritate*) against our firm knowledge (*in re certa*) that it is not true (*contra veritatem*). Primitive law does not assume anything against firm knowledge. It schematises actuality itself.

Also, the scheme of interpretation must not be confused with a constitutive rule.¹⁵ The scheme does not tell us that killing a member *counts as* loss of membership. Primitive law does not take scores like a game does. The rule does not construct an institutional reality different from the actual reality, it does not establish a difference between a brute and an institutional fact. Rather, it informs us about a change that has taken place in the actual world itself.

Rather than establishing a fictional or institutional account the rules schematise interpretation. In critical philosophy the notion of a 'scheme' links to the notions of the faculty of imagination, the faculty of making *present* something which is not present in sensual perception. Imagination projects an order into the world, an order, however, which is not merely superimposed on the real world, but which makes up the very reality of the real. Within the context of critical philosophy the faculty of imagination is not exhausted by allowing us to spontaneously create phantasy images, it also, and crucially, allows us to

¹⁴ See Pierre Oliver, *Legal Fictions in Practice and Legal Science* (Rotterdam University Press 1975).

¹⁵ See John R Searle, *The Construction of Social Reality* (Penguin 1995).

understand objectivity as objective.¹⁶ Imagination, for instance, allows us to actually experience objects as non-perspectival entities even though all we ever see from any given object are different perspectives.¹⁷ Imagination adds to experience in schematic form those things we do not perceive.

In a similar way the law's schematising of interpretation tells us the following: you might not have noticed, you might not have realised it, but *Adalbert* actually has lost his membership in the community. It might not be readily visible, but this is what has actually happened. The rules thus do not talk about fictions, they do not establish separate institutional facts; rather they allow us to experience a certain reality in its totality.¹⁸

¹⁶ 'Kant claims that the very same rule-governed conceptual activity that occurs in the free-play of the imagination constitutes perceptual experience, when it is guided by independent reality. According to this interpretation, the 'productive imagination' (which is Kant's term for the faculty that generates intuitive representings of the form 'this cube') provides the subject-terms of perceptual judgments.' Winfried Sellars, *Kant's Transcendental Metaphysics*, (Ridgeview 2002) 273. See also Gary Banham, *Kant's Transcendental Imagination* (Palgrave Macmillan 2005).

¹⁷ 'Consider as an example a perceptual experience such as that you might enjoy if you were to hold a bottle in your hand with eyes closed. You have a sense of the presence of the whole bottle, even though you only make contact with the bottle at a few isolated points ... One way we might try to explain this is by observing that you draw on your knowledge of what bottles are You bring to bear your conceptual skills. This is doubtless right. But it does not, I think, do justice to the phenomenology of the experience. For, crucially, your sense of the presence of the bottle is a sense of its perceptual presence. That is, you do not merely think or infer that there is a bottle present, in the way, say, that you think or infer that there is a room next door. The presence of the bottle is not inferred or surmised. It is experienced.' Alva Noë, 'Is the World a Grand Illusion?' in Alva Noë (ed), *Is the Visual World a Grand Illusion?* (Imprint Academic 2002) 8-9.

¹⁸ 'It may be remembered, from Kelsen, that norms serve as a scheme of interpretation. They invest events and structures with significance. From a legal point of view, x counts as y (an utterance as an oath, for example). Norms can be used, therefore, to idealise realities and thus to render social facts expressive of ideals or of something evil.' Alexander Somek, 'Idealisation, de-politicization and economic due process: System transition in the European Union' in Bogdan Iancu (ed) *The law/politics distinction in contemporary public law adjudication* (Eleven International 2009).

B. Modern Law

All law is primitive law.

What distinguishes modern law from primitive law is not a difference in the technique applied. Modern law, too, is a technique of ordering society by schematising an interpretation of violence as legally irrelevant.

Modern law differs from primitive law not in its functioning, but first and foremost in the degree of centralisation.¹⁹

As we have seen, primitive law establishes a de-centralised system of self-help. The rules are created by no-one²⁰ and applied by everyone. We heard that *Wernbar* is permitted to kill *Adalbert*, since *Adalbert* has killed *Wilco*. But who establishes the fact that *Adalbert* really has killed *Wilco*? It is *Wernbar* himself who is judge in this case. He is judge and executive organ in one person. He legally determines that *Adalbert* has lost his membership in the community, since *Adalbert* has killed *Wilco*; as a consequence he can kill *Adalbert* without this act having any legal consequence.

However, *Arnulf* may reach a different conclusion. He, too, acts as a judge and executive force in one person and he might differ about the membership-status of *Wilco*. He might be of the opinion, or, for that matter, even know, that *Wilco* had killed *Ansgar*; he might thus declare that *Wilco* has thereby lost his membership, thus permitting *Adalbert's* killing of *Wilco*, thus leading to *Wernbar's* loss of membership, thus making a killing of *Wernbar* legally irrelevant.

¹⁹ This idea is, of course, taken from Kelsen, who treats the difference between primitive legal systems (ancient legal systems and international legal regimes) and modern legal systems not as a difference between systems consisting of only primary norms and one consisting of primary and secondary norms, but rather as a difference in centralisation. Hans Kelsen 'The Strategy of Peace' (1944) 49 *The American Journal of Sociology* 381, 384.

²⁰ The rules of Germanic Law were originally customary law handed down orally in legal narratives. See Dennis Howard Green *Medieval Listening and Reading: The Primary Reception of German Literature 800-1300* (Cambridge University Press 1994) 39 and Bernhard Rehfeldt 'Saga und Lagsaga' 72 *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 1955: 47

Primitive law does not provide for a centralised organ to determine which interpretation is conclusive. The A-clan and the W-clan may differ about who is the legal organ and who is the band of criminals. Without centralisation we have a plurality of legal truths.

Modern law differs from primitive law in that it tries to do away with this defect by centralising the application (and also the creation) of the law.

What is important, however, is that this centralisation of the application of primitive law can itself only be effected by primitive means. The transition from primitive law to modern law cannot, by definition, avail itself of the means of modern law. Centralisation thus has to be created by primitive means. There has to be a decentralised creation of centralisation.

What, then, is centralisation? If we want to centralise the application of primitive law, all we have to do is to add (actually replace) a condition in our rule. The condition which the original primitive rule sets down for the loss of membership and thus for the legal irrelevance of killing someone is that this someone has actually killed a member. A centralised version of this rule would add the condition that a certain organ determines that the person in question has killed a member. Actually, the centralised rule would replace the requirement 'if someone takes the life of a member' with 'if a competent organ declares that someone has

taken the life of a member'. This is all that is needed for centralisation.²¹

Still, what we have before us are two conditionals, two statements which make the occurrence of two different facts the conditions of allowing everyone to interpret the killing of someone as legally irrelevant. Now, even in the centralised version of the law, the application of the conditional (i.e. the establishment of the fact that conditions the interpretation of killing someone as legally irrelevant), is still entrusted to everyone. It cannot be otherwise. Thus even the centralised version of the rule is applied in a decentralised manner. Whereas in the original, decentralised version everyone was called to establish for himself or herself that someone has actually killed a member, the centralised version entrusts to everyone to decide whether the competent organ has actually declared that someone has taken the life of a member. Now, it is regularly much easier to reach agreement on the fact that someone has declared something rather than on the fact that someone has killed someone. The controversy of the decentralised determination 'What has really happened back then?' is reduced to the less onerous, yet still decentralised determination of 'What has the judge said and is he really a judge?'

²¹ Here an actual fact is *replaced* by the declaration of an actual fact. Simply *adding* the declaration of a fact to the fact itself would not result in centralisation, but in the two-pronged system of centralisation and decentralisation: if the rule stated as its condition that 'someone has actually killed someone *and* a competent organ declares that someone has actually killed someone' this would allow for a situation in which the organ declares that A has killed B, yet C knows (or believes to know) that in fact A has not killed B. Centralisation is thus first and foremost a remedy to perspectivism and the epistemological problem of *opinion*. Legal utterances have to be understood in a constitutive and not in a declaratory sense and this owes to the demands of centralisation. In this context the term 'constitutive' is used in the classic juristic sense, as opposed to 'declaratory' and not in the Searlian sense, which is opposed to 'regulatory'. Understanding the utterance of a competent organ in a merely declaratory sense means that we do not take the organ to determine what is the case but we take the facts themselves to determine what is the case and we take the organ only to declare what is determined in the facts themselves. This, however, means nothing but that we ultimately want everyone to determine by himself or herself what is the case. Someone has to decide. The law cannot choose between either letting the facts or letting an organ decide. It can only choose between letting everyone or letting someone decide. The difference between declaratory and constitutive statements is thus a difference between decentralised and centralised determination of facts.

This centralisation by decentralised means indicates that an understanding of the law which focuses on commands is incomplete. The command enters the legal stage as the content of the decree of the judge (or the legislator). However, as we have seen, the command of the judge is but a condition of the applicability of a rule which has to be applied by everyone, i.e. has to be applied in a decentralised manner. The command thus always rests on a more fundamental rule, a rule, however, which cannot be understood as a command.

Over the centuries modern law has heaped ever new levels of centralisation onto the primitive law, it has folded the primitive law onto itself again and again. It has centralised the infliction of sanctions, the creations of rules and parts of rules, the establishment of legal organs, and so on. The tools by which this has been done, however, have not changed. Thus, since the centralisation can only be achieved by decentralised means, there remains an unresolvable primitivity in even the most advanced forms of law.

C. Conclusion

The law orders society by schematising interpretation. It orders society not by demanding or prohibiting action, but by allowing a certain interpretation of states of affairs, ultimately, the interpretation of violence as legally irrelevant. By allowing to interpret certain forms of violence as legally irrelevant, the law monopolises force and thus creates a coercive order that pacifies the land. The function of the law is to create peace and it achieves this peace by interpretation.

We are used to thinking about the law as being a body of norms enhanced by some kind of coercive apparatus. We are used to thinking that the law needs the state to enforce it. This view, however, obfuscates the insight that law and state are co-original. The law does not need a coercive apparatus to enforce it, rather the law consists in declaring certain forms of coercion lawful and thus turning these forces into a coercive apparatus.